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In the
Supreme Court of the United States

OCTOBER TERM, 1967.

No. 364

ST. JOE PAPER COMPANY,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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This brief is filed by respondent The Fidelity and Casualty Company of New York in opposition to the petition of St. Joe Paper Company for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment entered in this case on April 18, 1967. The grounds upon which this Court's jurisdiction is sought to be invoked are set out in petitioner's

brief and will not be repeated here. However, this respondent's conception of the questions presented differs from petitioner's and the questions will therefore be restated.

QUESTIONS PRESENTED

1. Whether the Trial Court abused the discretion granted it by Rule 15(b), Federal Rules of Civil Procedure, to permit the trial of an issue not raised by the pleadings but properly developed through evidence received without objection.

2. Whether the decision of the United States Court of Appeals for the Fifth Circuit, approving the trial of such an issue, amounts to an erroneous interpretation of Rule 15(b) which should be corrected by this Court in the exercise of its power to supervise the construction and operation of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The petitioner, St. Joe Paper Company, invoking diversity of citizenship jurisdiction, filed suit in the United States District Court for the Middle District of Florida against the respondent insurance companies to recover over $86,000 St. Joe had purportedly lost because of the "fraudulent or dishonest" acts of Robert M. Jones, one of its employees covered by the fidelity insurance in force with respondents.

St. Joe's case in chief consisted of a stipulation of facts and certain supporting documents (R. 116-138) which established these facts:

On June 15, 1959, St. Joe purchased Fort Wayne Corrugated Paper Company's container plants located in Pittsburg, Penn-

sylvania, Hartford City, Indiana, Rochester, New York, and Chicago. With the purchase, St. Joe acquired the right to sell to Fort Wayne's customers, all users of cardboard boxes, and it also hired some of Fort Wayne's employees, such as Robert M. Jones, the manager of the Pittsburgh plant, and Paul Dickmeyer, the company's vice-president and treasurer and Jones' immediate superior. In the change over, Jones remained in charge of the Pittsburgh operation, including the plant's production and sales, and Dickmeyer became General Manager of St. Joe's Fort Wayne Division, with supervisory authority over the newly acquired plants.

One of the customers St. Joe acquired with the purchase was Anchor Hocking Glass Corporation, which had been under contract to buy containers from the Pittsburgh plant. On all sales to Anchor Hocking, Fort Wayne had paid a four per cent commission to Box Sales Agency at a post office box in Lancaster, Ohio, where Anchor Hocking had its general offices. After the acquisition, Anchor Hocking continued to do business with the Pittsburgh plant, and St. Joe adopted Fort Wayne's practice of sending the four per cent commission, in the form of monthly checks, to the post office box.

Box Sales Agency had "no officers, representatives, employees or members" (R. 138). Jones, in fact, received the commission checks and deposited them to a "Box Sales Agency" checking account at the Lancaster National Bank; and then he transmitted the funds to his personal bank account in Pittsburgh. The money helped Jones "obtain certain sales advantages" in his dealings with Anchor Hocking. (R. 131). It was the amount of these commissions paid to "Box Sales Agency" that St. Joe sought to recover against respondents. (Respondent Hartford's fidelity insurance was in force from the time of the acquisition until August 5, 1960, at which

time respondent Fidelity and Casualty wrote the fidelity bond covering the employees, including Jones, at the Pittsburgh plant. Jones was insured under that coverage until the spring of 1961, when St. Joe contends it "discovered" the loss in question.)

The respondents contended that St. Joe could not recover its alleged loss because it had knowledge or information that Jones had committed a fraudulent or dishonest act within the meaning of certain provisions of the policies which automatically terminated the fidelity coverage once St. Joe acquired such knowledge or information about one of its insured employees (R. 22-33, 115).

At the pretrial conference the Court entered an order (R. 74) striking certain defenses which respondents had addressed to the issue of "knowledge or information" (R. 22-33). In essence, these defenses asserted that St. Joe, at the time it acquired the box plants, had knowledge or information that the substantial Anchor Hocking account had been obtained by Jones, for Fort Wayne's Pittsburgh plant, because Jones and the Fort Wayne officials, including Paul Dickmeyer, were willing to make a "kick back" to Anchor Hocking or its purchasing department in the form of the four per cent commission checks mailed to the post office box in Lancaster. In being a party to the transaction, Jones had committed a "fraudulent or dishonest" act because the "kick back" was unlawful, amounting to "commercial bribery" or a violation of the Robinson-Patman Act, Title 15, United States Code, Sections 13 and 13a (R. 31).

The stricken defenses further asserted that St. Joe, after it received the information, "became concerned that it might be subjected to criminal or civil liability to the extent that it participated in the payment of such commissions," (R. 31-32)

and that an investigation to disclose the principals of Box Sales Agency might lead to the loss of the account. To keep the business St. Joe took no action, continued to pay the commissions and thus waived its right to proceed against respondents under the fidelity coverage.

Respondent's case was presented through the testimony of Fort Wayne's president, Harold Treen, Paul Dickmeyer (Jones' superior who went to St. Joe in the change over), Jones, himself, and St. Joe's officers, who, by the time of the trial, were no longer connected with the company. Their testimony authorized the jury to conclude that it was known by St. Joe from the outset that Box Sales Agency was a fictitious creation, put together by Jones, with Fort Wayne's blessings, to get and to keep the lucrative Anchor Hocking account. The jury was also entitled to find that St. Joe made a business decision not to investigate the situation to determine whether Anchor Hocking, or someone close to it, or Jones was picking up the checks at the post office box. And as the Court of Appeals found below, the jury was entitled to be charged that St. Joe could not recover if it had knowledge or information that Anchor Hocking or persons connected with Anchor Hocking were receiving all or a part of the commissions.

ARGUMENT

As St. Joe has conceded in its petitioner's brief, under Rule 15(b) the jury is entitled to consider an issue, not raised by the pleadings, if it is tried by the implied consent of the parties. In fact, the trial judge has sufficient latitude, in determining whether such an issue should be submitted, that his decision on the matter cannot be reversed unless it amounts to an abuse of discretion. *Gallon v. Lloyd-Thomas Co.*, (8th

Cir. 1959), 264 F.2d 821, 823. It would therefore appear that St. Joe's petition should not be granted unless it can be demonstrated, initially, that the trial of the "kick back" issue amounted to an abuse of discretion, and, further, that the abuse was of such magnitude that this Court should intervene to give definitive treatment to the rule.

We submit that it was not an abuse of discretion to submit the issue to the jury. Petitioner's contention that it was thus deprived of notice that payments to Anchor Hocking or its personnel might bar recovery is without merit. It was St. Joe's counsel, not respondents', who, on cross examination, interrogated Jones about the Box Sales Agency - Anchor Hocking arrangement he had set up while employed with Fort Wayne (R. 583-598, 636-643). On subsequent re-direct examination of Jones, he fully explained the transaction without meritorious objection from St. Joe's counsel (R. 624-636). The evidence thus initiated by St. Joe was that Jones had created a method of passing money under the table where it would do the most good; and it was going either to Anchor Hocking, its purchasing authorities, or Jones, as the jury was permitted to find.

As for Robinson-Patman, St. Joe, itself, injected its possible violation into the case. In presenting the stipulation of fact to the jury in its case in chief, St. Joe introduced a letter it had requested Jones to write to Robert Bartlett, its vice-president (R. 130-131). It was later developed by respondents that St. Joe wanted the letter, for whatever protection it might afford it, because it was concerned that the commissions were nothing more than unlawful kickbacks in violation of the Robinson-Patman Act (R. 360-367, 572-577). In *Standard Title Insurance Company v. Roberts*, (8th Cir. 1965), 349 F.2d 613, 620-21, the Court acknowledged the proposition that,

where a party takes affirmative action, during the trial, to introduce evidence on an issue not expressly raised by the pleadings, he cannot later contest the trial of the issue. In this case, if, in fact, the jury instruction complained of was not addressed to an issue framed by the pleadings, then it was clearly a permissible charge on the evidence adduced in part by St. Joe.

For the foregoing reasons, we submit that it has not been made clear by petitioner that the trial judge abused the discretion given him under Rule 15(b). Even if there was an abuse, there has been no showing that the trial judge gave the rule a construction which should be set aside by this Court.

CONCLUSION

The decision of the Court of Appeals should not be disturbed, and St. Joe's petition should be denied.

Respectfully submitted,

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